

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP889

Cir. Ct. No. 2013CV8318

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

YOUNG MINDS CHRISTIAN PREPARATORY SCHOOL,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 KESSLER, J. Young Minds Christian Preparatory School appeals a circuit court order upholding an administrative decision which directed the school to repay \$65,433.54 received by the school under the National School Lunch Program. We affirm.

BACKGROUND

¶2 The Young Minds Christian Preparatory School (the School) is a private elementary school in Milwaukee. Most students at the School qualify for free meals under the School Breakfast Program and the National School Lunch Program (NSLP).¹ Both programs are funded by the United States Department of Agriculture (USDA). The State agency which administers the program in Wisconsin is the State Department of Public Instruction (DPI).

The Federal Program.

¶3 The USDA provides states with funds to reimburse schools that provide meals to students, provided the schools' meals meet certain nutritional standards and the students served meet eligibility standards.

¶4 The federal standards pertaining to student eligibility are known as "Performance Standard 1." *See* 7 C.F.R § 210.18(b)(2)(i).² Schools are

¹ Because the same laws and regulations relating to enforcement apply to both federally funded school meal programs, we refer to the programs collectively as "NSLP."

² 7 C.F.R. § 210.18(b) provides, in pertinent part:

Administrative reviews.

....

(b) *Definitions.* The following definitions are provided in order to clarify State agency administrative review requirements:

....

(2) *Critical areas* means the following two performance standards described in detail in paragraph (g) of this section which serve as measures of compliance with Program regulations:

(i) Performance Standard 1--Certification/Counting/Claiming--
All free, reduced price and paid lunches claimed for

reimbursed after submitting a “benefit issuance list” to the DPI. That list must identify each student who is eligible for reimbursable meals, the date the child became approved for eligibility, the category of meals for which the student is eligible, and any changes in eligibility made after the initial approval process. *See* 7 C.F.R. § 210.7(c)(1).

¶5 Reimbursable meals must also satisfy nutrition requirements based on meal portion size (which varies based on the age groups of the students) and meal component requirements. The federal standards for breakfast nutrition and portion size are described in 7 C.F.R. § 220.8,³ while 7 C.F.R. § 210.10 describes the federal standards for lunch nutrition and portion size. These requirements are known as “Performance Standard 2.” Essentially, the minimum portion size for each nutritional category varies with the age group into which each child falls. The size of the minimum nutritional content and size of the portion is identified in the federal regulations by specific volume (*e.g.*, 1 cup of milk) or by weight (*e.g.*, 4 ounces of meat). *See* 7 C.F.R. § 210.10(a)-(n).

reimbursement are served only to children eligible for free, reduced price and paid lunches, respectively; and counted, recorded, consolidated and reported through a system which consistently yields correct claims.

(ii) *Performance Standard 2--Meal Requirements.* Reimbursable lunches meet the meal requirements in § 210.10 of this chapter, as applicable to the age/grade group reviewed. Reimbursable breakfasts meet the meal requirements in §§ 220.8 and 220.23 of this chapter, as applicable to the age/grade group reviewed.

(Emphasis added.)

³ The federal regulations pertaining to nutrition standards were in effect from 2008-2012. We cite, however, to the current version of the Code of Federal Regulations, unless otherwise noted, because the regulations relevant to this appeal have not changed in a way that affect this opinion.

¶6 The federal regulations also require participating schools to maintain records specifying the components of each meal served during each school week. *See* 7 C.F.R. § 220.8(a)(3) (breakfast recording requirements); 7 C.F.R. § 210.10(a)(3) (lunch recording requirements). Upon a school’s entry into the breakfast and lunch programs, the USDA provides each school with a manual titled “USDA Menu Planner for Healthy School Meals,” which specifies the information schools must provide in their production records. This information includes food components, recipes, serving sizes, portions, the actual amount of food prepared, the number of reimbursable and non-reimbursable meals served, substitutions and leftovers.

¶7 States are required to ensure that participating schools comply with the federal requirements and must take fiscal action to recover funds that were not properly payable.⁴ *See* 7 C.F.R. § 210.19(c). Failure to enforce compliance requires the state to return funds to the USDA.⁵ *See* 7 C.F.R. § 210.19(c)(3).

⁴ 7 C.F.R. § 210.19(c) provides:

Fiscal action. State agencies are responsible for ensuring Program integrity at the school food authority level. State agencies *must take fiscal action against school food authorities for Claims for Reimbursement that are not properly payable, including, if warranted, the disallowance of funds for failure to take corrective action to comply with the meal requirements in parts 210 and 220 of this chapter....*

(Emphasis added.)

⁵ 7 C.F.R. § 210.19(c)(3) provides:

Failure to collect. *If a State agency fails to disallow a claim or recover an overpayment from a school food authority, as described in this section, [the Food and Nutrition Service] will notify the State agency that a claim may be assessed against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning overpayment. If after considering all available information, [the Food and Nutrition*

¶8 States must conduct periodic administrative reviews of participating schools and their records to ensure compliance. *See* 7 C.F.R. § 210.18(b)(1)-(2), (c). If a state’s review reveals violations of either Performance Standard 1 or Performance Standard 2, the state is required to take *corrective* action to ensure that the school corrects its violations. *See* 7 C.F.R. § 210.18(k). The state is required to “take *fiscal* action against [the school] for Claims for Reimbursement that are not properly payable [under 7 C.F.R. Part 210].” *See* 7 C.F.R. § 210.19(c) (emphasis added). If a school violates either the eligibility standards or the nutritional standards, and has not taken corrective action within the federally prescribed compliance deadline, the state may place the school on “withholding status.” That status allows the state agency to withhold payments to the school until the school completes its corrective action. *See* 7 C.F.R. §§ 210.18(l)(1)-(2); 210.24.

The DPI Visits the School.

¶9 As a result of parent complaints, representatives from the DPI made an unannounced visit to the School in late March 2011. During the visit, the DPI representatives noted multiple areas of concern. The DPI particularly noticed a missing required meal component (grain) and a lack of proper equipment to

Service] determines that a claim is warranted, [*the Food and Nutrition Service*] will assess a claim in the amount of such overpayment against the State agency. If the State agency fails to pay any such demand for funds promptly, [the Food and Nutrition Service] will reduce the State agency’s Letter of Credit by the sum due in accordance with [the Food and Nutrition Service’s] existing offset procedures for Letter of Credit. In such event, the State agency shall provide the funds necessary to maintain Program operations at the level of earnings from a source other than the Program.

(Emphasis added.)

adequately measure food portions. The DPI placed the School on a claims withholding status and scheduled another on-site evaluation for early April 2011.

¶10 Following the April evaluation, DPI representatives presented their findings to the School principal, Tracy Laster, and the administrative assistant responsible for handling “point of service” responsibilities during breakfast and lunch, Maneisha Gaston. The DPI sent the School a lengthy written report identifying deficiencies as to Performance Standard 2 and the corrective actions required to meet federal regulations. Specifically, the DPI indicated that the School:

- Failed to keep proper menu records for the review period to show that portion sizes met the daily minimum amounts as required by the menu planning approach specified in the contract between the School and the DPI;
- Failed to provide proper menu records for the review period to show that the weekly requirements for grain/bread, meat/meat alternative, and fruit/vegetable were met;
- Kept separate rosters for the traditional breakfast served in the cafeteria and the breakfast transported to the classrooms, allowing students to consume two breakfasts, both of which the School claimed reimbursement for;
- Made an improper substitution in the breakfast menu by substituting a bread/grain component for the required meat/meat alternative component;
- Had no Child Nutrition labels on file for purchased processed items; and

- Had no standardized recipes for menu items containing more than one ingredient.

The School was required to comply with the corrective actions by June 24, 2011.

¶11 For the next two months, the DPI, Laster, and the owners of Food For Thought, the company that provided the School's meals, communicated electronically about the deficiencies. Food for Thought provided food production documentation to the DPI, while Laster emailed the DPI a corrective action plan. The DPI informed both that their documentation was incomplete and did not satisfy the federal reporting requirements. The School continued to communicate with the DPI regarding its missing documentation; however, the DPI continued to indicate that the School's production records were incomplete under the federal reporting requirements.

¶12 In mid July 2011, the DPI took fiscal action against the School. The DPI acknowledged that the School made improvements on several of its violations, but concluded the School was still in violation of multiple Performance Standard 2 (nutrition) requirements. The DPI concluded that the School still:

- Showed a practice of double-counting breakfasts;
- Had incomplete production records;
- Claimed meals for students who did not receive meals; and
- Had missing meal components for both breakfast and lunch.

The DPI determined that the School received \$8,177.12 for the August 2010-June 2011 school year which was not reimbursable. The DPI continued to ask the School for proper production records for that school year. The DPI also told the

School it would remain in a withholding status until it submitted accurate claims and complete production records for three consecutive months.

¶13 Ultimately, after receiving additional breakfast and lunch production records from the School, the DPI determined that the School's reporting practices and the meals served continued to violate the federal requirements. Essentially, the school's documentation was incomplete and insufficient to support its breakfast and lunch claims from August 2010 through February 2011. Consequently, the DPI calculated that the School owed a repayment of \$65,433.54 for meals that were improperly documented, but for which the School was reimbursed. The DPI also told the School that it would remain in withholding status until the repayment was paid in full and until the School complied with federal reporting requirements for three consecutive months.

¶14 The School appealed the DPI's determination to the Division of Hearings and Appeals. An Administrative Law Judge (ALJ) upheld the DPI's determination.

Appeals to the Circuit Court.

¶15 The School petitioned the circuit court for judicial review of the ALJ's decision. On September 4, 2012, the circuit court found that the DPI had not acted within its authority when it conditioned the School's removal from withholding status upon its repayment of \$65,433.54. The circuit court ordered the DPI to: (1) review and cross-reference all of the submitted materials covering the August 2010 through February 2011 period, on a meal-by-meal basis; (2) identify each meal it concluded was not reimbursable under the federal program; and (3) explain why the meal was not reimbursable.

¶16 The DPI complied with the circuit court's order. In April 2013, the DPI sent the School a spreadsheet which summarized its results, meal-by-meal, component-by-component. The spreadsheet showed that *all* of the meals for which the School sought reimbursement either were missing food components or contained insufficient measurements to establish that the portion sizes met the federal requirements. The DPI again invited the School to submit additional documentation to support its claims for reimbursement. The School did not do so. The DPI then issued the Decision and Order at issue in this appeal, which required the School to repay the DPI \$65,433.54.

¶17 The School filed another petition for review with the circuit court, arguing that the DPI's determination was barred by: (1) claim preclusion and (2) regulatory time limits, and (3) that substantial evidence did not support the DPI's determination. The circuit court disagreed and upheld the DPI's determination. This appeal follows.

DISCUSSION

¶18 On appeal, the School argues that: (1) the DPI action is time barred by 7 C.F.R. § 210.8(b)(4); (2) the School provided all the documentation required by the court and by federal regulations; and (3) "*Res Judicata* prevents DPI from attempting to relitigate the same issue."

Standard of Review.

¶19 We review the decision of the agency, not the circuit court. *See Wisconsin Cent. Ltd. v. PSC*, 170 Wis. 2d 558, 567, 490 N.W.2d 27 (Ct. App. 1992). "We grant one of three levels of deference to administrative agency decisions: great weight, due weight, or de novo review." *Masri v. LIRC*, 2014

WI 81, ¶21, 356 Wis. 2d 405, 850 N.W.2d 298. “Reviewing courts apply due weight deference to agency interpretations ‘when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court.’” *Id.*, ¶23 (citation omitted). “The decision to apply due weight deference is based more on the fact that the legislature charged the agency with administering the statute than on the agency’s specialized knowledge or expertise.” *Id.* “Under due weight deference, a reviewing court will not interfere with the agency’s reasonable interpretation if it fits within the purpose of the statute unless there is a more reasonable interpretation available.” *Id.* We apply a due weight standard of review here. The DPI is the state agency charged with administering the federal program described in 7 C.F.R. Part 210 and has substantial experience in doing so. We affirm the agency’s findings of fact if there is credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. *Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998).

The DPI’s repayment claim was not time-barred.

¶20 The DPI took fiscal action against the School on August 19, 2011, when it requested repayment of \$65,433.54 to cover the DPI’s overpayment of meals from August 2010 through February 2011. The DPI did so because it could not determine from records provided that the School served meals which complied with the nutritional requirements of Performance Standard 2.

¶21 The School contends that the DPI violated federal law because the DPI’s fiscal action began more than six months after the last day of the claim

month at issue. The federal regulations on which the School relies, 7 C.F.R. § 210.8(b)(4), states:

Corrective action. The State agency shall promptly take *corrective action* with respect to any Claim for Reimbursement which includes more than the number of lunches served, by type, to eligible children. In taking corrective action, State agencies may make adjustments on claims filed within the 60-day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS-10) for the claim month required under § 210.5(d) of this part. Upward adjustments in Program funds claimed which are not reflected in the final FNS-10 for the claim month shall not be made unless authorized by FNS.⁶ Except that, upward adjustments for the current and prior fiscal years resulting from any review or audit may be made, at the discretion of the State agency. *Downward adjustments in amounts claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.*

(Emphasis added.)

¶22 As explained above, two distinct Performance Standards govern the NSLP. 7 C.F.R. § 210.8(b)(4) relates to “corrective action” (as opposed to fiscal action). Section 210.8(b)(4) deals with Performance Standard 1, pertaining to a child’s eligibility, the number of eligible children and the number of meals served on a given day. As such, we conclude that § 210.8(b)(4) does not apply to the fiscal action at issue here, which instead involves the lack of adequate records to establish that the School provided meals compliant with the nutritional requirements of Performance Standard 2.

¶23 However, if we assume, without deciding, that 7 C.F.R. 210.8(b)(4) applies to reimbursement claims for Performance Standard 2 violations, the

⁶ “FNS” means “the Food and Nutrition Service, United States Department of Agriculture.” 7 C.F.R. § 210.2.

regulation does not set time limits for “downward adjustments” (i.e., reducing the claim). Here a “downward adjustment” occurred when the DPI determined that the School had been paid improperly under the federal program. Further, a separate federal regulation instructs that unless the claim relates to specifically identified violations involving student eligibility, the federal regulations *require* that “fiscal action shall be extended back to the beginning of the school year or that point in time during the current school year when the infraction first occurred, as applicable.” *See* 7 C.F.R. § 210.19(c)(2)(ii).⁷

⁷ 7 C.F.R. § 210.19(c) provides:

Fiscal action. State agencies are responsible for ensuring Program integrity at the school food authority level. State agencies must take fiscal action against school food authorities for Claims for Reimbursement that are not properly payable, including, if warranted, the disallowance of funds for failure to take corrective action to comply with the meal requirements in parts 210 and 220 of this chapter....

....

(2) General principles. When taking fiscal action, State agencies shall consider the following:

....

(ii) Unless otherwise specified under § 210.18(m) of this part, *fiscal action shall be extended back to the beginning of the school year or that point in time during the current school year when the infraction first occurred, as applicable.* Based on the severity and longevity of the problem, the *State agency may extend fiscal action back to previous school years, as applicable.* The State agency shall ensure that any Claim for Reimbursement, filed subsequent to the reviews conducted under § 210.18 and prior to the implementation of corrective action, is limited to lunches eligible for reimbursement under this part.

(Emphasis added.)

¶24 We conclude that 7 C.F.R. § 210.8(b)(4) does not preclude the DPI's fiscal actions here.

Credible and Substantial Evidence Supports the DPI's determination.

¶25 The circuit court's September 4, 2012 order held the \$65,433.54 reimbursement claim "no longer effective," and set conditions under which DPI could "eventually seek repayment." The DPI complied with the court's conditions. The DPI reviewed all of the documents it had already obtained and asked the School for additional information. The School declined to provide additional documents.

¶26 Ultimately, the DPI produced a spreadsheet which identified each meal served on each date between August 2010 and February 2011. The spreadsheet identified whether the meal was reimbursable, provided reasons for each non-reimbursable meal, and pointed to documentary support for its conclusions. The DPI concluded again that the School was not entitled to the \$65,433.54 it had received under the NSLP. The circuit court accorded the DPI's decision due weight, and held that the DPI's cross-referencing and analysis of the records established the inadequacy of the School's records to demonstrate compliance with the federal nutritional requirements. The circuit court affirmed the DPI's decision and held that the DPI was entitled to recover the full amount of the overpayment.

¶27 The School argues on appeal that it provided sufficient documentation to support its reimbursement claims and that the DPI's spreadsheet is inaccurate. We review an agency's finding of fact to determine whether there is credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. See *Target Stores*, 217 Wis. 2d at 11.

¶28 The minimum quantities for the required components of breakfasts and lunches vary by age group. Meats, cheeses, alternative proteins, and grains must be measured by weight; vegetables, fruits, and milk must be measured by volume in cups or cup fractions. *See* 7 C.F.R. § 210.10 (detailing measurement determinations for the school lunch program); 7 C.F.R. § 220.8 (detailing measuring determinations for the school breakfast program).

¶29 The DPI's analysis of the School's documentation indicates that all of the meals served between August 2010 and February 2011 were improperly documented in a way that made it impossible to determine whether the meals met the federal nutritional requirements. The circuit court noted, for example, that:

[The DPI's] review of the records The School supplied for its August 2, 2010 breakfast indicates confusion as to whether food is measured in weight or volume, which is key to determining whether the school met federal requirements to serve two servings of grain/bread for breakfast. 7 C.F.R. 220.8. For example, a four oz. serving of dry cereal by weight more than satisfies the regulation's requirement to serve "3/4 cup measure cereal" or "1 oz. weight cereal." *Id.* § 220.8(c). However, four oz. measured by volume is just 1/2 cup and would not obviously satisfy the 3/4 cup serving requirement.

¶30 The DPI's analysis is rife with analysis of this sort—either detailing improper measurements or missing meal components. As the circuit court noted "[t]his is not frivolous ... nit-picking on DPI's part; the difference between weight and volume directly affects whether the meal [the School] served that day satisfied the nutrition requirements." The circuit court's observation is correct.

¶31 The DPI is responsible for administering the federal school meal program in this state, and, as a result, must ensure compliance with the federal nutritional standards. The DPI relied on all of the information in its possession when making these determinations. Most of that information came from the

School. The DPI began communicating with the School in March 2011 regarding the school's food service program. The communication was ongoing for months, with the DPI making multiple requests for adequate documentation. The DPI reviewed all of the documents in its possession and gave the School an opportunity to add additional support for its reimbursement claims before making its decision. We are satisfied that the documents provided by the School and its contract food provider failed to support its claims for reimbursement as required by the federal standards. Thus, there is substantial credible evidence which supports DPI's decision.

The DPI's determination is not barred by *res judicata*/claim preclusion.

¶32 The School contends that the DPI's determination is barred by the circuit court's September 4, 2012 Opinion and Order. According to the School, that order disposed of the entire action.

¶33 The School relies solely on the last sentence in the court's order, but ignores the context in which it appears:

Accordingly IT IS HEREBY ORDERED that the decision of the Department of Public Instruction is REVERSED, *with instructions*. This is a final order that disposes of the entire matter in litigation and is intended by the court to be an appealable order under [WIS. STAT.] § 808.03(1).

(Emphasis added; bolding omitted.) The "instructions" noted appear earlier in the court's Opinion and Order:

[T]he requirement that [the School] re[pay] \$65,433.54 is no longer effective. *This does not mean, however, that DPI cannot eventually seek repayment of funds from the August 2010 to February 2011 time period if it deems that the records do not support a claimed meal. However, prior to requesting any such potential overpayment, DPI must first go through all of the relevant documents—transport sheets,*

‘production records,’ spreadsheets, nutrition labels, recipes, etc.—*for each meal in order to determine whether or not a meal is reimbursable.*

... [T]his court reminds DPI that *it may only seek repayment of overpayments for those specific days upon which the documentation*—whether it be failure to include an appropriate recipe, failure of [the School] to provide the appropriate child nutrition level, or whether it be for failure to indicate an acceptable substitution, etc.—*does not support [the School] as having served a reimbursable meal. See 7 C.F.R. 210.19(c)(2).* This means that *DPI is required to review all supporting records for each day in order to determine whether or not a meal served [meets] the requirements.*

(Emphasis added.)

¶34 The DPI did not relitigate the matter, but rather complied with the circuit court’s order. As described above, the DPI gave the School the opportunity to submit additional documentation; the School did nothing.⁸ The meal-by-meal, day-by-day review again determined that *all* of the meals served between August 2010 and February 2011 were not reimbursable. We conclude that the DPI was not barred from re-seeking reimbursement for inadequately documented meals.⁹

¶35 For the foregoing reasons, we affirm the circuit court.

⁸ To preserve an issue involving an administrative agency for judicial review, a party must raise it before the administrative agency. See *State v. Outagamie Cnty. Bd. of Adj.*, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376. We note that the School does not claim to have raised its *res judicata* theory with the DPI, when the DPI was examining documents and offering the School the opportunity to submit more information, before the School’s second appeal to the circuit court. However, because of the unusual circumstances presented here, we elected to decide the substantive issue presented.

⁹ To the extent the School raises issues not addressed by this decision, we conclude that our resolution of the issues addressed is dispositive and that the record supports the ALJ’s factual findings and legal conclusions.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

